

The Board considered the record listed in the July 21, 2003 Award. In addition, the Board considered the February 17, 2003 court-ordered independent medical examination report by Peter M. Bieri, M.D., the transcript of the November 17, 2003 deposition of Edward J. Prostic, M.D., together with the exhibits attached thereto, and the transcript of the November 20, 2003 Post Award Hearing. The parties entered into no additional stipulations as a part of this post-award proceeding.

### ISSUES

The Board entered a permanent partial disability award on October 31, 2003 based on a 14.5 percent permanent impairment to claimant's right shoulder. This is a post award request for medical treatment. Specifically, claimant seeks treatment for his left shoulder condition.

The ALJ denied claimant's post award request for medical treatment to his left shoulder "[b]ecause there is no clear relationship between claimant's current symptoms and his original work injury of November 21, 2000[.]"<sup>1</sup>

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Workers Compensation Act places the burden of proof upon claimant to establish his right to an award of compensation and to prove the conditions on which that right depends.<sup>2</sup> " 'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."<sup>3</sup> The Act is to be liberally construed to bring employers and employees within the provisions of the Act but those provisions are to be applied impartially to both.<sup>4</sup>

When the primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury. It is not compensable, however, where the worsening or new injury would have occurred even absent the primary injury or where it is shown to have been produced by an independent intervening cause.<sup>5</sup> Causal relation is a necessary element in establishing liability under a workers' compensation claim, and it cannot be presumed but must be proven by a preponderance of evidence.<sup>6</sup>

---

<sup>1</sup> Order (Jan. 27, 2004).

<sup>2</sup> K.S.A. 44-501(a); see also *Chandler v. Central Oil Corp.*, 253 Kan. 50, 853 P.2d 649 (1993) and *Box v. Cessna Aircraft Co.*, 236 Kan. 237, 689 P.2d 871 (1984).

<sup>3</sup> K.S.A. 44-508(g). See also *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

<sup>4</sup> K.S.A. 44-501(g).

<sup>5</sup> *Nance v. Harvey County*, 263 Kan. 542, 952 P.2d 411 (1997); *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 505 P.2d 697 (1973). See also *Bradford v. Boeing Military Airplanes*, 22 Kan. App. 2d 868, 924 P.2d 1263, rev. denied 261 Kan. 1082 (1996).

<sup>6</sup> See *Drake v. State Dept. of Social Welfare*, 210 Kan. 197, 499 P.2d 532 (1972).

It is undisputed that claimant injured both of his shoulders in his November 21, 2000 accident. However, claimant's left shoulder symptoms resolved. The medical treatment focused on claimant's right shoulder. Furthermore, the only impairment ratings were in relation to claimant's right shoulder.

Claimant testified at the November 20, 2003 post-award hearing that his left shoulder symptoms never resolved. However, Dr. Chris D. Fevurly testified that claimant's left shoulder symptoms had completely resolved by the time he last examined claimant on July 25, 2001. Dr. Prostic examined claimant on July 9, 2002, and November 20, 2002. On both these occasions claimant reported no left shoulder symptoms. But when Dr. Prostic saw claimant again at the request of claimant's attorney, on September 24, 2003, claimant reported left shoulder symptoms which Dr. Prostic believed were consistent with a rotator cuff tear. He related that condition to claimant's original work-related injury but did not explain the long absence of symptoms. Dr. Prostic also acknowledged that there was no prior diagnosis of a left rotator cuff tear neither by Dr. Prostic nor by any of the other physicians whose records he reviewed. Dr. Prostic merely said that claimant's symptoms returned (or began) sometime between his November 20, 2002 examination and his September 24, 2003 examination of claimant. Claimant had also been seen by Dr. Peter Bieri on February 17, 2003 for a court-ordered medical examination. Dr. Bieri's report states that claimant's left shoulder symptoms had resolved.

The only medical evidence relating claimant's current left shoulder complaints to his November 21, 2000 accident is the testimony of Dr. Prostic. However, the history claimant gave Dr. Prostic is inconsistent with the claimant's testimony at the post-award hearing. Contrary to claimant's testimony that his left shoulder symptoms never resolved, Dr. Prostic's records clearly show that claimant had no left shoulder symptoms in July and November of 2002, but that those symptoms were present in September of 2003. Given that claimant likewise had no left shoulder symptoms when he was examined by Dr. Fevurly in July of 2001 and when he was examined by Dr. Bieri in February of 2003, and in the absence of any explanation for how claimant could have gone for roughly two years without left shoulder symptoms but then have a recurrence in mid-2003 without any intervening injury, the Board finds Dr. Prostic's causation opinion is not credible. Furthermore, claimant's testimony that his left shoulder symptoms were continuous from his date of accident is not credible in light of the numerous medical records from several physicians to the contrary. Accordingly, the Board agrees with the conclusion reached by Judge Avery. There is no clear relationship between claimant's current symptoms and his original work injury of November 21, 2000.

### **AWARD**

**WHEREFORE**, the January 27, 2004 Order entered by Administrative Law Judge Brad E. Avery is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of June 2004.

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

c: Chris Miller, Attorney for Claimant  
Crystal Nesheim, Attorney for Respondent and its Insurance Carrier  
Brad E. Avery, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director